

BellSouth Telecommunications, Inc.
Alabama Legal Department
Room 304N
3196 Highway 280 South
Birmingham, AL 35243

francis semmes@bellsouth.com

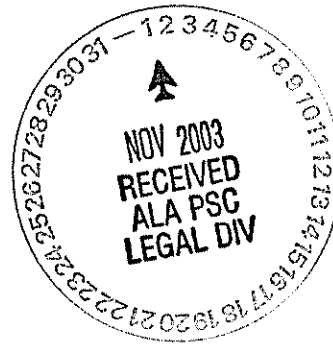
Francis B. Semmes
General Counsel - Alabama

205 972 2556
Fax 205 969 2285

October 30, 2003

VIA OVERNIGHT MAIL

Walter Thomas, Secretary
Alabama Public Service Commission
100 N. Union Street - 8th Floor
RSA Union Building
Montgomery, AL 36104



**Re: Petition for a Declaratory Order Regarding Classification of
IP Telephony Service - Docket No. 29016**

Dear Mr. Thomas:

Enclosed are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Comments in connection with the above referenced docket. Please distribute as needed and return a stamped copy to me in the envelope provided.

Thank you for your attention to this matter.

Sincerely yours,

Francis B. Semmes

FBS/mhs
Enclosures

cc: Honorable John Garner, ALJ
Mr. Darrell A. Baker, Director
Parties of Record

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

IN RE: Petition for a Declaratory Order)	
Regarding Classification of IP Telephony)	Docket No. 29016
Service)	

COMMENTS OF BELL SOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth"), through its undersigned counsel, submits the following comments in response to the Alabama Public Service Commission's ("Commission's") Order Establishing Declaratory Proceeding.¹

INTRODUCTION

The Commission has sought comments from interested parties concerning the various forms of intrastate phone-to-phone IP Telephony Service or other Voice over Internet Protocol ("VoIP") configurations (collectively, "IP Telephony Service"), the jurisdictional issues related to them, as well as comments on a petition for declaratory ruling requesting that this Commission find that providers of IP Telephony Service are "transportation companies" under the Alabama Code and, therefore, are subject to this Commission's jurisdiction for providing telephone service and paying intrastate access charges.²

I. A WIDE RANGE OF EVER EVOLVING IP TELEPHONY SERVICES MAKES IT DIFFICULT TO DETERMINE JURISDICTION.

There are many forms of IP Telephony Service, and they continue to multiply. These forms range from traditional "dumb" phone-to-"dumb" phone voice telephone service in which

¹ *In Re: Petition for a Declaratory Order Regarding Classification of IP Telephony Service*, Docket No. 29016, Order Establishing Declaratory Proceeding (Aug. 29, 2003) ("Order").

² *Id.* at 1, 4.

carriers use Internet protocol technologies to transmit the voice message between the calling and called parties via digital packets within their networks for reasons of network efficiency and economy, to communications originating and terminating between “intelligent” (software-driven) personal computers in which multiple voice and data transmissions occur between various points throughout the world by way of individually addressed and separately routed data packets. In the first case, the jurisdictional aspects of the service may be clearly identified, as is the case with a specific phone-to-phone service provided by AT&T and described in a petition it has filed with the Federal Communications Commission (“FCC”).³ In the second case, it may be impossible to undertake any sort of meaningful jurisdictional analysis. For all the forms in between, the jurisdictional issues become increasingly complex as traditional customer premises equipment (“CPE”) evolves, as equipment technologies converge, and as packets containing voice and data are sent across a multitude of international transmission routes by way of a broadband connection to the World Wide Web, or the “Internet.”

II. THE FCC IS ALREADY ADDRESSING IMPORTANT IP TELEPHONY COMPETITION AND PUBLIC POLICY ISSUES.

The Alabama Independent Incumbent Local Exchange Carriers’ (“ILECs”) petition⁴ raises critical issues. As an incumbent local exchange carrier itself, BellSouth has grave concerns on the impact that VoIP will have on universal service, access charges, telephone numbers, 911 emergency services, law enforcement assistance, and other public interest issues. At the same time, BellSouth, like the ILECs, is keenly interested in seeing that “a level playing

³ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002).

⁴ ILEC Petition for Declaratory Order Regarding Classification of IP Telephony Service (filed July 31, 2003) (“ILEC petition”).

field”⁵ is maintained, not just for providers of voice telephone service, but also for all providers of advanced communications services over multiple platforms. And as this Commission is undoubtedly aware, debate over the appropriate regulatory classification of VoIP communications services is raging both at the federal and state level.⁶ At the FCC, two petitions concerning the appropriate regulatory classification for particular “flavors” of VoIP service offerings are pending for resolution,⁷ while the role of VoIP providers in universal service, access charges, and a number of other issues are teed up in a number of federal proceedings.⁸ Recently, the FCC announced its intention to undertake a broad inquiry into VoIP.⁹

⁵ Order at 3, quoting ILEC petition at 3.

⁶ Recently, the United States District Court issued a permanent injunction preventing the Minnesota Public Utilities Commission from enforcing an order that sought to require a VoIP provider to comply with Minnesota rules and regulations pertaining to “telephone companies.” *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, Civil No. 03-5287 (MJD/JGL), Memorandum Opinion and Order (D. Minn. Oct. 16, 2003). In Florida, the state legislature passed a law prohibiting the regulation of VoIP providers as telecommunications carriers. Fla. Stat. chs. 364.01(3), 364.02(12) (2003).

⁷ *In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45 (filed Feb. 5, 2003); *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003). The AT&T petition referred to in footnote 3 is a wolf cloaked in sheep’s clothing; in that petition, the carrier uses Internet protocol-based transmission facilities to provide nothing more than basic plain old telephone service to its customers.

⁸ See, e.g., *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001); *In the Matter of Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review--Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format*, CC Docket No. 96-45, et al., Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752 (2002).

⁹ Howard Buskirk, *DSL, VoIP, Inter-carrier Compensation Top FCC’s Wireline Agenda This Fall*, TR Daily, Sept. 17, 2003; Edie Herman, *Powell Says it’s Time to Tackle VoIP*, Communications Daily, Oct. 2, 2003.

In comments filed with the FCC in response to the Vonage petition, a copy of which is attached, BellSouth urged the FCC to initiate a rulemaking to establish a comprehensive, national VoIP policy.¹⁰ Not surprisingly, many commenters shared this view.¹¹ In light of the FCC's previously stated intentions to initiate a VoIP proceeding, the statements of FCC Commissioners on the national importance of the topic, and the weight of the record thus far in the FCC's Vonage proceeding, BellSouth believes that it would be a mistake at this early stage in the development of VoIP technologies and services for this Commission and other state commissions to undertake what would amount to duplicative state proceedings that could, in turn, result in a patchwork of inconsistent state rules that interfere with the rapid evolution of these promising new consumer services and the development of an appropriate national regulatory framework for dealing with them.

III. THIS COMMISSION SHOULD NOT TAKE ANY ACTION THAT WILL CHILL INNOVATION OR PREEMPT THE FCC'S RESOLUTION OF CRITICAL COMPETITION AND PUBLIC INTEREST ISSUES.

A comprehensive and well-defined national VoIP policy will encourage deployment and innovation of VoIP on the broadest possible scale and will necessarily take into account the fact that pre-existing regulatory classifications, developed in an era before VoIP, could potentially subject service providers to different rules and obligations in providing substantially the same voice services unless rational new public policy changes are adopted to prevent it. An appropriate and comprehensive national VoIP policy should, therefore, address critical

¹⁰ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Comments of BellSouth Corporation, *passim* (filed Oct. 27, 2003) ("BellSouth Vonage Comments") (Attachment A).

¹¹ *See, e.g., In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Comments of Level3 Communications, LLC at 16; Comments of Qwest Communications International at 3-4; Comments of Iowa Utilities Board at 3; Comments of NASUCA at 11 (filed Oct. 27, 2003).

competitive policy issues such as universal service funding, intercarrier compensation, and the use of telephone numbering resources. At the same time, an appropriate and comprehensive national VoIP policy should establish minimally intrusive (but evenly applied) consumer protection and public safety benchmarks for all VoIP providers.

State commission rulings on the regulatory classification of VoIP in advance of an FCC ruling could result in the premature ossification and subsequent discouragement of the development of these innovative communications services. With the possible exception of certain so-called traditional phone-to-phone VoIP service arrangements that do not raise new public policy issues and which may be ripe for state regulatory consideration,¹² BellSouth believes that states should voluntarily abstain from making regulatory determinations regarding this new category of services until the FCC concludes its proceedings. Moreover, it is entirely conceivable that the FCC will want to engage the states in a regulatory partnership, perhaps in the form of a joint board,¹³ to facilitate the development of a rational national policy framework for VoIP. In any event, BellSouth urges this Commission to defer these proceedings and to abstain from making any regulatory classification decisions, except as noted below, until after the FCC has completed its work.

IV. ILECS MUST BE FAIRLY COMPENSATED FOR THE USE OF THEIR NETWORKS.

BellSouth's request for this Commission's voluntary abstention on the issue until the FCC provides clear national guidance should not be taken as an indication that BellSouth has not developed firm principles about VoIP. As the ILECs point out, to the extent that VoIP is used to

¹² See *infra*, section V, pp. 6-8.

¹³ NARUC has recommended the use of a Section 706 Joint Conference; see NARUC 2003 Resolutions and Policy Positions: Telecommunications, Resolution Relating to Voice Over The Internet Telecommunications, *available at* http://www.naruc.org/Resolutions/2003/winter/telecom/voice_over.shtml.

complete a voice call that uses a local exchange carrier's network in either origination or termination, then the local exchange carrier should be entitled to compensation for the use of its network. This is particularly true where the VoIP technology used is either transparent to the originating end-user customer or when it is employed as a technology upgrade of an existing telecommunications service. Moreover, any service provider that delivers voice or data traffic for termination on another carrier's network used to provide universal service should pay its fair share of the universal service obligation.

On the consumer protection and public interest side, it is imperative that the FCC establish guidelines concerning competitively neutral but technically and economically feasible methods for VoIP providers to comply with E911 emergency services and law enforcement assistance requirements. The regulatory classification sought by the ILECs would address a number of these issues, but in BellSouth's view, the FCC should be allowed to establish general principles that will govern these issues before involvement by the states. This is particularly important given the interstate and global character of many of these services, their use of Internet access facilities, and their integral relationship to many other Internet and packet-based consumer service applications.

V. AT&T'S "PHONE-TO-PHONE" IP TELEPHONY IS PLAIN OLD TELEPHONE SERVICE.

As mentioned above, BellSouth agrees with the ILECs that at least one form of intrastate phone-to-phone IP telephony, the service described by AT&T in its current petition pending before the FCC, is at the extreme end of a range of IP Telephony Service configurations, and that its status under current regulatory classifications is clear.¹⁴ If this Commission were to grant the

¹⁴ *Supra* note 3 and accompanying text. This issue has been pending and has been ripe for decision at the FCC since Oct. 18, 2002. In its recent comments in the Vonage proceeding, BellSouth and others urged the FCC to dismiss the AT&T petition and to find such a service

ILECs' request for declaratory ruling with respect to this particular service arrangement alone, this Commission would not be undermining the development of a national VoIP policy. The service described in AT&T's petition is nothing more than a normal voice call originating and terminating over standard telephones, indistinguishable from a circuit-switched voice call. These kinds of IP Telephony providers originate and terminate traffic using different phone numbers and different equipment than Internet service provider traffic; the relevant packets are not mixed with "Internet" packets at the originating and terminating ends of the calls, and the carriers measure the traffic for billing purposes.¹⁵

Under current regulatory classifications, this service is so clearly a telecommunications service that its intrastate component is undoubtedly subject to the jurisdiction of this Commission. BellSouth believes, however, that at the present time this Commission should only rule with respect to the specific phone-to-phone IP Telephony configuration described by AT&T in its petition. As the ILECs note in their petition, the details of the different IP Telephony Service configurations are "complex and varied."¹⁶ This complexity counsels against immediate action by this Commission on any IP Telephony configuration other than phone-to-phone IP Telephony, especially in light of parallel pending and contemplated proceedings at the FCC.

BellSouth believes that the ILECs' concerns will be addressed when the FCC takes action on relevant pending proceedings and initiates its rulemaking to establish a timely national VoIP regulatory framework. This Commission should not commit resources to an exhaustive fact-finding inquiry over the various forms of VoIP technologies and services and should instead

configuration to be a "telecommunications service" under current rules. *See* BellSouth Vonage Comments at 8.

¹⁵ *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, BellSouth Reply Comments at 8 (filed Feb. 6, 2003).

¹⁶ ILEC petition at 2.

engage actively with the FCC in order to establish a comprehensive national framework that takes into account this Commission's particular concerns.

CONCLUSION

BellSouth respectfully urges this Commission to voluntarily abstain from devoting its resources to an open-ended inquiry into the appropriate classification of the numerous forms of IP Telephony Services, which, as explained above, will be the subject of a comprehensive federal rulemaking proceeding. The Commission should, however, grant the ILECs' request with respect to phone-to-phone IP Telephony, and it should actively participate in the FCC's IP rulemaking proceeding.

Respectfully submitted this 31st day of October, 2003



FRANCIS B. SEMMES (SEM002)
General Counsel - Alabama
Room 304N
3196 Highway 280 South
Birmingham, Alabama 35243
(205) 972-2556

R. DOUGLAS LACKEY
THEODORE R. KINGSLEY
Suite 4300
675 W. Peachtree St., NE
Atlanta, Georgia 30375
(404) 335-0720

ITS ATTORNEYS

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554**

In the Matter of)	
)	
Vonage Holdings)	
Corporation)	
)	
Petition for Declaratory Ruling)	WC Docket No. 03-211
Concerning an Order of the Minnesota)	
Public Utilities Commission)	

COMMENTS

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively "BellSouth"), submits the following comments in response to the Commission's *Public Notice* in this proceeding.¹

BACKGROUND

On September 22, Vonage asked the FCC to issue a declaratory ruling finding that the September 11, 2003 order of the Minnesota Public Utilities Commission requiring Vonage to comply with state laws governing providers of telephone service is preempted because Vonage is a provider of information services, and state regulation of these services unavoidably would conflict with the national policy of promoting unregulated competition in the Internet and information services market.² On October 16, 2003, the United States District Court for the

¹ *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, WC Docket No. 03-211, *Public Notice*, DA 03-2952 (rel. Sept. 26, 2003).

² Vonage Petition at 1.

District of Minnesota issued a permanent injunction forbidding the Minnesota PUC from enforcing its September 11 order.³

I. ALTHOUGH THE VONAGE PETITION IS MOOT, THE COMMISSION NEEDS TO ESTABLISH A NATIONAL POLICY FOR VOIP

In light of the permanent injunction, there is no longer any uncertainty for this Commission to resolve with respect to the specific relief sought by Vonage in connection with the Minnesota PUC's September 11 order. The Commission need not and should not detain its limited resources with that request. Rather, the Commission should direct its available resources toward initiating a rulemaking proceeding that establishes a generally applicable regulatory framework for Voice over Internet Protocol ("VoIP") and similar services. This regulatory framework should encourage both innovation and market-based pricing while assuring achievement of core universal service goals, and at the same time establish minimally intrusive consumer protection and public safety requirements that apply equally to all voice competitors.

That this Commission must so proceed is demonstrated by the reality that courts and states will continue to fill any void caused by continued passivity. On October 6 the United States Court of Appeals for the Ninth Circuit vacated this Commission's *Cable Modem Declaratory Ruling* by relying on an earlier case by the same three-judge panel in which the panel "took pains to 'note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue'" before the Court.⁴ Within the ninth circuit, litigation between exchange carriers and a VoIP provider over payment of access charges associated with VoIP service has been stayed and referred by the United States District Court for the Western

³ *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, Civil No. 03-5287 (MJD/JGL), Memorandum Opinion and Order (D. Minn. Oct. 16, 2003).

⁴ *Brand X Internet Services v. FCC*, No. 02-70518, 2003 U.S. App. LEXIS 20306, at *29 (9th Cir. Oct. 6, 2003).

District of Washington to the Washington Utilities and Transportation Commission on primary jurisdiction grounds.⁵

In addition to these examples, two state legislatures have passed or are considering laws pertinent to VoIP,⁶ and several other states' regulatory authorities are considering the issues raised by VoIP either on their own, or in response to petitions from interested parties.⁷ Two of the states in which BellSouth provides local exchange service have dealt or could deal with VoIP: the Florida Commission declined to address a declaratory ruling from a VoIP provider,⁸ and the legislature enacted legislation excluding VoIP from the definition of "services" subject to the jurisdiction of the Florida Public Service Commission;⁹ meanwhile, in Alabama, 31 incumbent local exchange carriers ("ILECs"), not including BellSouth, have petitioned the Alabama Public Service Commission to declare VoIP providers subject to intrastate access charges.¹⁰

In light of all this, it is clear that this Commission must develop a national policy framework for VoIP in order to avoid continued, and possibly inconsistent, judicial construction of a statute for which the agency has primary administrative responsibility and the special

⁵ *Washington Exchange Carrier Ass'n v. LocalDial Corp.*, Case No. CV03-5012RBL, Stay Order and Order of Referral to WUTC (W.D. Wash. Sept. 4, 2003).

⁶ Fla. Stat. chs. 364.01(3), 364.02(12) (2003); Pa. Senate Bill 900, Session of 2003, available at <http://www.legis.state.pa.us/WU01/LI/BI/BI/2003/0/SB0900P1202.HTM>.

⁷ E.g., Alabama, California, Colorado, Illinois, New York, Ohio, and Wisconsin.

⁸ *Petition of CNM Networks, Inc. for Declaratory Statement that CNM's Phone-to-Phone Internet Protocol (IP) Telephony Is Not "Telecommunications" and that CNM Is Not A "Telecommunications Company" Subject to Florida Public Service Commission Jurisdiction*, Docket 021061-TP, Order Denying Petition for Declaratory Statement, at 3 (Fla. P.S.C. Dec. 31, 2002).

⁹ Fla. Stat. chs. 364.01(3), 364.02(12) (2003).

¹⁰ *In Re: Petition for a Declaratory Order regarding the classification of IP Telephony Service*, Docket 29016 (Ala. P.S.C. filed July 31, 2003); Order Establishing Declaratory Proceeding (Aug. 29, 2003) (requiring comments to be filed by Oct. 31 and reply comments to be filed by Dec. 2), attached as Exhibit 1.

expertise to construe, as well as to avoid potentially diverse and inconsistent state determinations. The Commission must also announce its intention to do so soon in order to provide federal courts, and state legislatures and commissions, with assurances that they may voluntarily abstain from deciding cases or controversies in advance of the Commission's national policy determinations.

II. A NATIONAL VOIP POLICY SHOULD EMBRACE MARKET PRICING, ASSURE UNIVERSAL SERVICE SUPPORT AND ESTABLISH MINIMALLY INTRUSIVE CONSUMER PROTECTION AND PUBLIC SAFETY REQUIREMENTS

1. The Commission Should Address Critical Competition Policy Issues by Concluding its Long-Pending Inter-carrier Compensation and Universal Service Proceedings.

The most critical competition policy issues implicated by the instant petition, and the various state and federal administrative, legislative and judicial proceedings, are the continued integrity of the Commission's universal service and access charge regimes. It is imperative that these issues not be determined on a piecemeal, patchwork basis in different jurisdictions before different agencies and tribunals. Because so much of the debate surrounding VoIP centers around the classification of the service as either an "information service" or a "telecommunications service," so that entities can either avoid or receive access charges as is in their business interest, the Commission should continue to facilitate the establishment of a unified approach to inter-carrier compensation, and should make a determination regarding the appropriate role of all service providers that use any portion of the public switched telephone network ("PSTN") in the provision of their service, regardless of that service's regulatory status, in funding the universal service mandate.

As AT&T long-ago pointed out, the regulatory inequities between carriers using IP technology in the transmission of a phone-to-phone voice call and carriers transmitting the same call entirely over the circuit switched network are untenable:

Nowhere is this inequity more blatant than in the case of phone-to-phone telecommunications services that use Internet Protocol ("IP") technology in their long-haul networks Moreover, any failure to enforce USF and access charge payment obligations flies in the face of the Commission's commitment to technology-neutral policies, and triggers more artificially-stimulated migration from traditional circuit switched telephony to packet switched IP services that are able to take advantage of this loophole Any Commission failure to enforce USF funding obligations (and access charge assessments) on telecommunications services that are provided over new technology backbones skews the market by making providers of comparable services subject to vastly different payment obligations.¹¹

The 1996 Act makes clear that one of the principles of universal service is to provide access to advanced telecommunications and information services in all regions of the nation.¹² In its currently pending universal service proceeding, the Commission will consider whether all Internet service providers should contribute to the universal service fund regardless of the broadband platform that they use.¹³ Clearly, any service provider that delivers voice or data traffic for termination on another carrier's network used to provide universal service should pay its fair share of the universal service obligation.

Universal service funding is, of course, integrally related to access charges, the charges that flow between connecting carriers arising out of the exchange of traffic across each other's

¹¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, AT&T Comments on Report to Congress, at 12 (filed Jan. 26, 1998) (footnotes omitted).

¹² 47 U.S.C. § 254(b)(2).

¹³ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket No. 02-33, *et al.*, BellSouth Comments at 29-32 (filed May 3, 2002).

networks. Intercarrier compensation reform will resolve a number of issues raised by the current debates over the appropriate regulatory classification of VoIP. Moving to bill and keep would eliminate most carrier-to-carrier payments and require carriers to recover their costs directly from end users. Such reform would greatly simplify the existing federal and state access charge regime and eliminate much of the controversy that parties believe can only be resolved by shoehorning services into existing regulatory categories. In the meantime, the Commission must be sensitive to the predicaments of state commissions who are supposed to maintain universal service within their jurisdictions even as they observe access charges that support those services evaporate as carriers migrate their voice traffic from traditional networks to, as AT&T puts it, "new technologies," in order to try to gain a "loophole"¹⁴ by seeking to extend the ESP exemption beyond its intended application in order to avoid paying access charges for another carrier's carriage of the functional equivalent of voice telephony on its network.

Until such time as the Commission concludes its intercarrier compensation proceeding, the Commission should construe its ESP exemption as inapplicable to VoIP services that are the functional equivalent of, or substitute for, voice telephony, regardless of whether those services are ultimately classified by the Commission as telecommunications services or information services. There is nothing in the prior record supporting the Commission's current ESP access exemption that suggests that the exemption was ever intended to reach information services that are the functional equivalents of voice telecommunications services.

¹⁴ AT&T Comments on Report to Congress, *supra* note 11.

2. The Commission Should Address Remaining Policy Issues in the Context of a VoIP Rulemaking Proceeding.

While resolution of the universal service and intercarrier compensation proceedings discussed above will enable the Commission to fulfill Congress's universal service objectives and take pressure off of litigants and state commissions to force VoIP issues into forums beyond this Commission's reach, it is just as important that the Commission establish a technology-neutral regulatory framework for innovative services that applies equally to all competing communications providers. The Commission's policies should favor the self-regulation of free market competition and pricing. For example, if one considers the effects of regulatory restraint on service quality, as in the case of wireless phone service markets, experience shows that consumers want the choice of trading different levels of voice quality (latency, dropped calls, and the like) in exchange for new service features such as nationwide calling plans, mobility and nifty handsets.

The Commission should recognize that the profound shift in network architectures represented by VoIP, the inherent advantages of cable companies, with their dominant market position in the delivery of broadband services and light-handed regulation relative to common carriers, and the entry of many new providers ranging from multiple small entities to the largest power utilities with their extensive network grid, herald a new era of robust inter-modal competition for consumers of communications services. At the same time, the Commission needs to address other policy issues raised by the quick emergence and trend toward widespread adoption within communications markets of VoIP technologies,¹⁵ including the impact of VoIP

¹⁵ See Yuki Noguchi, *Internet Services Challenge Definition Of 'Phone Company,'* Washington Post, Oct. 23, 2003, at E01; Peter Grant and Almar Latour, *Battered Telecoms Face New Challenge: Internet Calling,* Wall Street Journal, Oct. 9, 2003, at A1.

on North American Numbering Plan Resources,¹⁶ and the role of local number portability in connection with VoIP. Numbering resources must be used and allocated in a manner that continues to assure that the Commission's policies of responsible conservation and competitively neutral telephone numbering administration are maintained.

With respect to the three specific "VoIP" proceedings pending at the Commission, one is ripe for immediate decision, one is moot and the other should be folded into the comprehensive proceeding initiated to establish a national policy for VoIP. The larger issues raised by the Vonage petition with respect to that entity's current service offering simply do not bear on AT&T's pending petition; AT&T's petition so clearly describes a phone-to-phone telecommunications service under the Commission's landmark *Report to Congress* that the Commission should move forward expeditiously and issue an order making that finding.¹⁷ As shown above, the Vonage petition is otherwise moot because that company has already gained the legal relief it seeks. The pulver.com petition has never been ripe for decision, as explained by BellSouth and others.¹⁸ The Commission should resolve the pulver.com petition, if at all, in the context of a general VoIP rulemaking, after it has denied the AT&T petition.

¹⁶ BellSouth, Qwest and Verizon, *VoIP Numbering Issues* (Nov. 12, 2002) (White Paper presented to the North American Numbering Council ("NANC") at the NANC Nov. 19-20 Meeting), available at http://www.nanc-chair.org/docs/Nov/Nov02_VoIP_White_Paper.doc; but see AT&T, *VoIP Numbering Issues – Much Ado About Nothing?*, available at http://www.nanc-chair.org/docs/nowg/Jan03_ATT_VOIP_Paper.doc.

¹⁷ See *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002); BellSouth Opposition to AT&T's Petition for Declaratory Ruling (filed Dec. 18, 2002); see also *supra* n.11 and accompanying text.

¹⁸ See *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Comments of BellSouth at 1-2 (filed Mar. 14, 2003); Comments of The United States Telecom Association at 1-2 (filed Mar. 14, 2003).

3. The Commission Should Also Address Consumer Protection and Public Interest Issues in the Context of a National VoIP Policy.

In the context of establishing a national VoIP policy in an expedited rulemaking, the Commission can and should develop a set of minimally intrusive consumer protection and public safety requirements that, as with its competition policy, apply equally to all competing voice communications providers. On the consumer protection and public interest side it is imperative that the Commission establish guidelines concerning the competitively neutral requirements to comply with E911 emergency services and law enforcement assistance requirements. The Commission should make clear that such requirements should apply to VoIP after giving the VoIP industry a reasonable opportunity to collaborate on developing cost-effective technical solutions to any unique problems posed by the widespread introduction of innovative VoIP network architectures and technologies.

By signaling to the states and the courts that it is willing and able to address the important competition, consumer interest, and public safety issues in a comprehensive national VoIP policy in the very near future, the Commission can prevent piecemeal development of conflicting regulatory and legal requirements that will inhibit development of innovative technologies, force artificial pigeon-holing of new technologies in existing regulatory categories, and discourage regulatory arbitrage. In this regard, the Commission can and should request that courts and state commissions voluntarily abstain from undertaking proceedings that could result in inconsistencies that thwart the development of a comprehensive national policy.

CONCLUSION

In light of the permanent injunction issued by the United States District Court, the Commission need not grant the relief sought by the Vonage petition. Instead, it should direct its resources to concluding its intercarrier compensation proceeding by adopting a simplified bill

and keep regime; and to concluding its universal service proceeding in which it should require VoIP carriers to contribute to universal service funding. The Commission should clarify that its current ESP access exemption does not apply to VoIP functional equivalents to voice telephony services, even if the Commission ultimately classifies those services as information services. Finally, the Commission should announce its intention to initiate a comprehensive VoIP rulemaking to address relevant competition and public interest issues. These developments alone will take the pressure off of litigants and state commissions to force VoIP issues into venues beyond the Commission's reach.

Respectfully submitted,

BELLSOUTH CORPORATION

By: /s/ Theodore R. Kingsley
Theodore R. Kingsley

Its Attorney

Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0720

Date: October 27, 2003

EXHIBIT 1



STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P O BOX 304260
MONTGOMERY, ALABAMA 36130-4260

JIM SULLIVAN, PRESIDENT
JAN COOK, ASSOCIATE COMMISSIONER
GEORGE C. WALLACE, JR., ASSOCIATE COMMISSIONER

WALTER L. THOMAS, JR.
SECRETARY

**IN RE: Petition for a Declaratory Order
regarding classification of IP Telephony
Service.**

DOCKET 29016

ORDER ESTABLISHING DECLATORY PROCEEDING

BY THE COMMISSION:

On July 31, 2003, the Alabama Local Exchange Carriers listed in Appendix A attached hereto (the "ILECs") filed a Petition for a Declaratory Order regarding the classification of IP Telephony Service (the "ILEC Petition"). Said ILEC Petition was submitted pursuant to Rule 22 of the Commission's Rules of Practice.¹ The ILEC Petition seeks a Declaratory Ruling from the Commission holding that: (1) providers of intrastate phone-to-phone IP Telephony Service or other Voice over Internet Protocol ("VoIP") configurations (collectively, "IP Telephony Service") are "transportation companies" as defined by Alabama Code §37-2-1 (1975); (2) providers of intrastate IP Telephony Service are subject to APSC rules applicable to the provision of telephone service, including the filing of tariffs; and (3) providers of IP Telephony Service are responsible for the payment of intrastate access charges for the origination or termination of non-local traffic from, or to, the ILEC's public switched telephone network that originate and terminate in Alabama.

DOCKET 29016 - #2

In support of their Petition, the ILECs assert that there are numerous forms of IP Telephony Service which bear investigation. The ILECs note that as defined by the FCC, "phone-to-phone" IP Telephony consists of services in which the provider: (1) holds itself out as providing voice telephone service; (2) does not require the use of a computer to transmit the message; (3) allows a customer to call telephone numbers assigned in accordance with the North American Numbering Plan; and (4) transmits customer information without change in form or content.²

The ILECs maintain that in some instances, a phone-to-phone IP Telephony provider seeks to offer both local and interexchange service to its customers through a DSL or other high speed connection, which in some cases may also be used by a computer. In other instances, the ILECs assert that interexchange carriers offer access to IP Telephony Service for the use of a standard telephone where the customer dials a seven digit local number, reaches the provider for a second dial tone and places the local or long distance call. In yet another configuration, the ILECs represent that IP Telephony Service may be accessed by a personal computer that accesses a provider for the purpose of local or long distance call completion.

The ILECs maintain that while the details of the different IP Telephony Service configurations are complex and varied, they are all performed in order to complete a voice call and generally utilize a local exchange carrier's network to originate or terminate the call. The ILECs maintain that the IP Telephony Service provider typically

¹ The ILEC Petition is attached hereto as Appendix B.

² See ILEC Petition at p. 2, *Citing FCC Report to Congress (Universal Service)*, FCC 98-67, 13 FCC Rcd. 11, 830 at para. 88-89 (April 10, 1998).

connects to the network of the originating and terminating local exchange carrier at points of interconnection much like traditional IXCs. The ILECs seek a ruling affirming that the provision of such services on an intrastate basis is subject to the jurisdiction of the Commission and to the same rules and regulations that apply to the voice services provided by the ILECs.³

The Joint Petitioners assert that the APSC has jurisdiction over "utilities", which under *Alabama Code* §37-1-30 (1975) includes any company considered a "transportation company." According to the ILECs, Title 37 of the *Alabama Code* provides that "the term 'transportation company' shall include every person not engaged solely in interstate commerce or business that now or may hereafter own, operate, lease, manage, or control those common carriers or for hire....any telephone line."⁴ The ILECs assert that the APSC's regulatory authority is predicated on the interpretation of what constitutes a "telephone line". The ILECs represent that the term telephone line has never been restricted to apply solely to old copper lines, but has instead been broadly interpreted as incorporating the provision of voice telephone service over any type of medium including microwave frequencies and light waves carried over fiber optic strands.⁵

The ILECs assert that the Declaratory Ruling they seek is needed in order to ensure that a level playing field is maintained for all providers of voice telephone service and that new entrants, as well as the ILECs, are put on notice regarding the rules and

³ *Id* at pp. 2-3.

⁴ See *Alabama Code* §37-2-1 (1975), emphasis added.

⁵ *Id* at p. 3.

DOCKET 29016 - #4

regulations that will apply to IP Telephony Service in Alabama. The ILECs maintain that a failure by the Commission to assert jurisdiction over IP Telephony Service providers could result in a breakdown of the Commission's established regulatory scheme and result in revenue losses that could ultimately endanger the ability of the ILECs to maintain their carrier of last resort obligations.

Even prior to the filing of the ILEC Petition discussed herein, the Commission had begun to receive inquiries regarding the jurisdictional status of IP Telephony Service on an increasingly frequent basis. It accordingly appears that the issues presented in the ILEC Petition concerning the jurisdictional status of IP Telephony Service are timely and should be investigated further by the Commission. We, therefore, establish this declaratory proceeding to consider issues related to IP Telephony Service and the jurisdictional status of same.

In order to aid the investigative process, the Commission herein seeks comments from interested parties concerning the various forms of IP Telephony Service and the jurisdictional issues related thereto. The Commission further seeks comments specifically addressing the matters raised in the ILEC Petition attached hereto as Appendix A. Initial comments will be considered by the Commission if received on, or before, October 31, 2003. Reply comments will be considered by the Commission if filed on, or before, December 2, 2003.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That a Declaratory Proceeding is hereby established to address issues related to IP Telephony Service including the jurisdictional status of such service.

DOCKET 29016 - #5


IT IS FURTHER ORDERED BY THE COMMISSION, That interested parties may file initial comments in this cause provided that such comments are filed on, or before, October 31, 2003.

IT IS FURTHER ORDERED BY THE COMMISSION, That Reply Comments may be filed by interested parties on, or before, December 2, 2003.

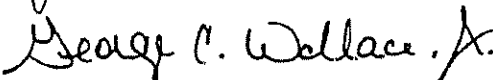
IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 29th day of August, 2003.

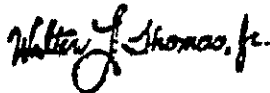
ALABAMA PUBLIC SERVICE COMMISSION


Jim Sullivan, President


Jan Cook, Commissioner


George C. Wallace, Jr., Commissioner

ATTEST: A True Copy



Walter L. Thomas, Jr., Secretary

APPENDIX A

ALLTEL Alabama, Inc.
Ardmore Telephone Company, Inc.
Blountsville Telephone Company
Butler Telephone Company, Inc.
Brindlee Mountain Telephone Company
Castleberry Telephone Company, Inc.
CenturyTel of Alabama, LLC
Farmers Telephone Cooperative, Inc.
Floral Telecommunications
Frontier Communications of Alabama
Frontier Communications of Lamar County
Frontier Communications of the South, Inc.
Graceba Total Communications, Inc.
Gulf Telephone Company
Hayneville Telephone Company, Inc.
Hopper Telecommunications Co., Inc.
Interstate Telephone Company
Millry Telephone Company, Inc.
Mon-Cre Telephone Cooperative, Inc.
Moundville Telephone Company, Inc.
National Telephone of Alabama, Inc.
New Hope Telephone Cooperative, Inc.
Oakman Telephone Company, Inc.
Otelco Telephone, LLC. (formerly
Oneonta Telephone Company, Inc.)
Peoples Telephone Company, Inc.
Pine Belt Telephone Company, Inc.
Ragland Telephone Company, Inc.
Roanoke Telephone Company, Inc.
Union Springs Telephone Company
Valley Telephone Company

CERTIFICATE OF SERVICE

I do hereby certify that I have this 27th day of October 2003 served the following parties to this action with a copy of the foregoing **BELLSOUTH COMMENTS** by electronic filing and/or by electronic mail to the parties listed below.

+Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S. W.
Room TW-A325
Washington, D. C. 20554

+Qualex International
The Portals, 445 12th Street, S. W.
Room CY-B402
Washington, D. C. 20554

*Janice M. Myles
Wireline Competition Bureau
Competition Policy Division
Federal Communications Commission
The Portals, 445 12th Street, S. W.
Room 5-C327
Washington, D. C. 20554
janice.myles@fcc.gov

/s/ Juanita H. Lee
Juanita H. Lee

+ VIA ELECTRONIC FILING
* VIA ELECTRONIC MAIL

CERTIFICATE OF SERVICE

I do hereby certify that I have this 27th day of October 2003 served the following parties to this action with a copy of the foregoing **BELLSOUTH COMMENTS** by electronic filing and/or by electronic mail to the parties listed below.

+Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S. W.
Room TW-A325
Washington, D. C. 20554

+Qualex International
The Portals, 445 12th Street, S. W.
Room CY-B402
Washington, D. C. 20554

*Janice M. Myles
Wireline Competition Bureau
Competition Policy Division
Federal Communications Commission
The Portals, 445 12th Street, S. W.
Room 5-C327
Washington, D. C. 20554
janice.myles@fcc.gov

/s/ Juanita H. Lee
Juanita H. Lee

+ VIA ELECTRONIC FILING
* VIA ELECTRONIC MAIL

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Comments of BellSouth Telecommunications, Inc. on all parties of record by placing a copy of same in the United States Mail, postage prepaid, on this the 30th day of **October**, 2003.

Mark D. Wilkerson, Esq.
Brantley, Wilkerson & Bryan, P.C.
405 South Hull Street
Montgomery, AL 36104



FRANCIS B. SEMMES